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LAI KEE PENG v. TAY HUP LIAN

FEDERAL COURT, PUTRAJAYA
ARIFIN ZAKARIA CJ
ZULKEFLI AHMAD MAKINUDIN CJ (MALAYA)
ABDULL HAMID EMBONG FCJ
B ABU SAMAH NORDIN FCJ
BALIA YUSOF WAHI JCA
[CIVIL APPEAL NO: 02(f)-48-08-2013(W)]
20 JANUARY 2016

C ***LEGAL PROFESSION:*** *Solicitors – Stakeholders – Money deposited with solicitor as stakeholder by purchaser for benefit of vendor – Developer and other purchasers entered into consent order – Stakeholder not party to consent order – Request for release of retention sum by developer not complied with by stakeholder – Whether consent order binding on stakeholder – Whether consent order prevented stakeholder* D *from releasing retention sum – Whether stakeholder entitled to release retention sum – Whether solicitor in breach of stakeholding*

TRUSTS: *Trustee – Liability – Stakeholder – Money deposited with solicitor as stakeholder by purchaser for benefit of vendor – Whether solicitor a trustee – Whether sum held by solicitor trust money – Whether there was breach of* E *stakeholding – Whether there was breach of trust – Solicitor acting as stakeholder for two parties served with court order declaring forfeiture of stake – Whether solicitor acted lawfully by paying stake to party declared to be entitled – Whether solicitor liable to make good stake to affected party if order reversed upon appeal – Trustee Act 1949, s. 63*

F The respondent had sold shop lots to Histyle Sdn Bhd ('Histyle') and under the sale and purchase agreement, Histyle would pay a retention sum of RM500,000 ('the retention sum') to the solicitor/stakeholder ('the appellant') who, in turn, will release it to the developer. However, the appellant resisted the respondent's solicitor's request for the retention sum, G believing that she was bound by a consent order entered by the developer and Histyle which stipulated that the said sum was to be retained. Neither the respondent nor the appellant was a party to the consent order. The developer absolutely assigned its right to the retention sum to the respondent who proceeded to demand for the payment of the same but the request was not H complied with. This prompted the appellant to claim for the retention sum ('the JB suit') at the High Court. An amendment substituting the appellant with Histyle resulted in the appellant ceasing to be a party to the JB suit. Histyle counterclaimed for a declaration, *inter alia*, that the retention sum be forfeited. Due to the non-attendance of the respondent's solicitor, the JB suit I was struck out and a judgment in default ('the JID') was entered against the respondent in respect of Histyle's counterclaim. Unsuccessful in his application to set aside the JID at the High Court, the respondent proceeded to appeal to the Court of Appeal. Histyle served the JID to the appellant,

demanding for the retention sum and the appellant released the same, notwithstanding the respondent's pending appeal. The Court of Appeal, in allowing the respondent's appeal, set aside the JID and remitted the case to the Johor Bahru High Court ('JBHC') for trial. Pending the disposal of the JBHC, the respondent filed an originating summons ('OS') for an order to direct the appellant to pay the retention sum but the application was dismissed. The respondent appealed to the Court of Appeal and in the meantime, in the JBHC, the appellant was ordered to release the retention sum to the respondent. The Court of Appeal later allowed the respondent's appeal against the decision in the OS and the retention sum was ordered to be paid into the court. Hence, the present appeal by the appellant. The issues that arose for the court's determination were: (i) where a solicitor acted as stakeholder for two parties and was served with a court order declaring forfeiture of the stake, then: (a) did the solicitor act lawfully by paying the stake to the party declared to be entitled; and (b) would the solicitor be liable to make good the stake to the affected other party if the order is reversed upon appeal; and (ii) whether a declaratory order that is phrased accordingly enforceable and subjected to compliance.

Held (dismissing appeal with costs)
Per Abu Samah Nordin FCJ delivering the judgment of the court:

(1) A stakeholder is a trustee and a person who received money and holds it *in medio* pending the outcome of a future event. Once a solicitor holds money in trust for his client or any other party for a purpose, it does not matter whether the amount was sufficient to be utilised for that purpose. The money remains to be in trust. A breach of a stakeholding term is not just a breach of undertaking but also a breach of trust. The appellant was liable in law to make good the stake to the respondent. (paras 25, 26, 28 & 36)

(2) The consent order did not bind the appellant and the respondent. Furthermore, the High Court order could not be enforced against the appellant as she was not a party to the JB suit. She ceased to be a party to the JB suit after an amendment was made and she was substituted with Histyle. The appellant had therefore misconstrued the order given by the judge and released the retention sum to Histyle. (para 34)

(3) A declaratory judgment is a formal statement by the court pronouncing upon the existence or non-existence of a legal state of affairs. It pronounces upon a legal relationship but does not contain any order which can be enforced against the defendant. This is different from an executory judgment where the courts determine the rights of the parties and then order the defendant to act in a certain way *ie* by an order to pay damages. If it is disregarded, it can be enforced by official action, usually by levying execution against the defendant's property or imprisoning him for contempt of court. (para 30)

A ***Bahasa Malaysia*** *Headnotes*

Responden telah menjual lot-lot kedai kepada Histyle Sdn Bhd ('Histyle') dan di bawah perjanjian jual beli, Histyle akan membayar wang tahanan berjumlah RM500,000 ('wang tahanan') kepada peguamcara/pemegang amanah harta ('perayu') yang kemudian akan membayarnya kepada pemaju.
B Walau bagaimanapun, perayu enggan membayar wang tahanan kepada peguamcara responden apabila diminta kerana percaya bahawa dia terikat dengan perintah persetujuan antara pemaju dan Histyle yang menyatakan jumlah tersebut perlu ditahan. Responden mahupun perayu bukan pihak dalam perintah persetujuan tersebut. Pemaju menyerahkan haknya terhadap
C wang tahanan secara mutlak kepada responden yang seterusnya menuntut bayaran jumlah tersebut tetapi permintaan ini tidak dipenuhi. Ini menyebabkan perayu menuntut wang tahanan ('guaman JB') di Mahkamah Tinggi. Satu pindaan menggantikan perayu dengan Histyle menyebabkan perayu tidak lagi menjadi pihak dalam guaman JB. Histyle menuntut balas
D bagi deklarasi, antara lain, agar wang tahanan dilupuskan. Akibat ketidakhadiran peguamcara responden, guaman JB ditolak dan satu penghakiman ingkar ('JID') dimasukkan terhadap responden bagi tuntutan balas Histyle. Gagal dalam permohonannya untuk mengetepikan JID di Mahkamah Tinggi, responden merayu ke Mahkamah Rayuan. Histyle
E menyerahkan JID kepada perayu dengan menuntut wang tahanan dan perayu membayarnya, walaupun responden masih menunggu keputusan rayuan. Mahkamah Rayuan membenarkan rayuan responden, mengetepikan JID dan mengembalikan kes kepada Mahkamah Tinggi Johor Bahru ('MTJB') untuk dibicarakan. Sementara menunggu pelupusan MTJB, responden memfailkan
F saman pemula ('OS') bagi perintah mengarahkan perayu membayar wang tahanan namun permohonannya ditolak. Responden merayu ke Mahkamah Rayuan dan pada masa yang sama, di MTJB, perayu diperintahkan membayar wang tahanan kepada responden. Mahkamah Rayuan kemudian membenarkan rayuan responden terhadap keputusan OS dan wang tahanan diperintahkan agar dibayar kepada mahkamah. Oleh itu, rayuan ini oleh
G perayu. Isu-isu berbangkit yang perlu diputuskan mahkamah adalah: (i) apabila peguamcara bertindak sebagai pemegang amanah harta bagi dua pihak dan dikemukakan dengan perintah mahkamah mengisytiharkan pelupusan harta amanah, (a) adakah tindakan peguamcara sah apabila membayar harta amanah kepada pihak yang dikatakan berhak; dan
H (b) sekiranya perintah diakas berikutan rayuan, adakah peguamcara berkewajipan membayar harta amanah tersebut kepada pihak satu lagi yang terjejas; dan (ii) sama ada perintah perisytiharan yang dinyatakan sewajarnya boleh dikuatkuasakan dan dipatuhi.

Diputuskan (menolak rayuan dengan kos)
I **Oleh Abu Samah Nordin HMP menyampaikan penghakiman mahkamah:**

(1) Pemegang amanah harta ialah pemegang amanah dan individu yang menerima wang dan memegangnya sementara menunggu natijah hal perkara akan datang. Apabila seorang peguamcara memegang wang

sebagai amanah bagi anak guamnya atau mana-mana pihak bagi satu tujuan, tidak penting sama ada jumlah tersebut cukup untuk digunakan bagi tujuan tersebut. Wang kekal sebagai amanah. Pelanggaran terma pegangan amanah harta bukan sahaja satu pelanggaran akujanji tetapi juga satu pecah amanah. Di bawah undang-undang, perayu bertanggungan membayar harta amanah kepada responden.

(2) Perintah persetujuan tidak mengikat perayu dan responden. Tambahan lagi, perintah Mahkamah Tinggi juga tidak boleh dikuatkuasakan terhadap perayu kerana dia bukan pihak dalam guaman JB. Dia tidak lagi menjadi pihak dalam guaman JB selepas pindaan dibuat dan dia digantikan dengan Histyle. Dengan itu, perayu tersalah tafsir perintah hakim dengan membayar wang tahanan kepada Histyle.

(3) Perintah perisytiharan adalah pernyataan rasmi oleh mahkamah yang mengisytiharkan wujud atau tidak wujudnya hal perkara perundangan. Pengisytiharan dikeluarkan berdasarkan hubungan perundangan tetapi tidak mengandungi apa-apa perintah yang boleh dikuatkuasakan terhadap defendan. Ini berbeza dengan perintah pelaksanaan yang mana mahkamah memutuskan hak pihak-pihak dan kemudian memerintahkan defendan bertindak dengan cara tertentu, contohnya perintah membayar ganti rugi. Sekiranya tidak diendahkan, penguatkuasaan boleh dijalankan melalui tindakan rasmi, biasanya melalui pelaksanaan terhadap hartanah defendan atau penjatuhan hukuman penjara terhadapnya atas penghinaan mahkamah.

Case(s) referred to:
Burt v. Claude Cousins & Co Ltd [1971] 2 QB 426 ***(refd)***
Datuk M Kayveas & Anor v. Bar Council [2013] 7 CLJ 533 FC ***(refd)***
Kuldip Singh & Anor v. Lembaga Elektrik Negara & Anor [1982] 1 LNS 73 HC ***(refd)***
Sorrell v. Finch [1977] AC 728 ***(refd)***
Toh Theam Hock v. Kemajuan Perwira Management Corp Sdn Bhd [1987] 2 CLJ 26; [1987] CLJ (Rep) 400 SC ***(refd)***

Legislation referred to:
Trustee Act 1949, s. 63

For the appellant - Wong Hok Mun; M/s Azim, Tunku Farik & Wong
For the respondent - Gopal Sri Ram (MS Murthi & Lim Choon Kim with him); M/s Chambers of Murthi & Partners

[Editor's note: Appeal from Court of Appeal; Civil Appeal No: W-02-1997-2009 (affirmed).]

Reported by Najib Tamby

JUDGMENT

Abu Samah Nordin FCJ:

[1] This is a fairly straightforward case. It is a case involving a matter which any conveyancing solicitor should be familiar with. It concerns the duty and responsibility of a solicitor as a stakeholder in respect of money

A deposited by a purchaser for the benefit of the vendor or his assignee pending the execution of certain documents, including the transfer of ownership from the vendor to the purchaser pursuant to a sale and purchase agreement ('SPA'). It is not uncommon, as is the case before us, that the dispute as to who is entitled to the money held by the solicitor as stakeholder ultimately
B depends on the terms under which the money is held and the due performance by the parties of their respective obligations under the SPA.

[2] Under the SPA dated 1 June 1994 the respondent, as the vendor, agreed to sell 12 units of shop lots in Plaza Kluang Baru to the purchaser, Histyle Sdn Bhd ("Histyle") for a total purchase price of RM665,280. The
C developer of the Plaza Kluang Baru is Lian Foong Housing (M) Sdn Bhd ('the developer'). It was agreed between the respondent and Histyle that a sum of RM500,000 ('the retention sum') was to be paid by Histyle and retained by the solicitor, who is the appellant before us, as a stakeholder. The retention sum was to be released to the developer in accordance with cl. 4
D of the SPA.

[3] Clause 4 of the SPA states:

> 4. The purchaser's Solicitors are hereby authorised by all the parties hereto to release the Retention Sum to the Developer forthwith upon all the following events stipulated below are satisfied:
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> (a) the issue document of title to the said Land is duly registered in favour of the Purchaser free from all encumbrances in pursuance to Clause 5.1 of the said Sale and Purchase Agreement dated 24th August 1993;
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> (b) the Vendor executing all relevant documents relating to the assignment of their benefits and interests to the Property in favour of the Purchaser;
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> (c) all the existing caveats on the said Land are removed; and
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> (d) all documents in respect of the transfer of ownership of the Property from the Vendor to the Purchaser is completed, and the delivery of
> G the original of the following documents to the Purchaser:
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> (i) the original copy of the First Principal Agreement.

[4] On 16 October 1995, Messrs Murthi and Partners, the solicitors for the respondent wrote to the appellant requesting her to release the retention
H sum together with interest thereon to the developer as the conditions under cl. 4 of the SPA had been complied with. The appellant was at the material times the sole proprietor of Messrs Lai Kee Peng & Associates.

[5] On 25 October 1995 the appellant replied that she could not release the retention sum to the developer as she had been served with a consent
I order dated 24 October 1994 entered into by the parties in the Johor Bahru High Court Originating Summons No. 24-164-1994. She stated that under the consent order:

We are supposed to retain the sum of RM500,000.00 for the benefit of the plaintiffs in respect of the payment of any incidental costs arising out of the strata titles for their respective lots.

[6] The plaintiffs in the said originating summons are purchasers of other shop lots in Plaza Kluang Baru. The developer is the first defendant in the said originating summons. Histyle is the second defendant. The respondent before us is not a party to the said originating summons.

[7] The relevant part of the consent order reads as follows:

DAN DENGAN PERSETUJUAN ADALAH SELANJUTNYA DIPERINTAHKAN BAHAWA Defendan kedua dikehendaki menahan wang jumlah sebanyak RM500,000.00 sahaja (yang merupakan baki harga belian 12 unit kedai terletak di Tingkat Satu Plaza Kluang Bahru daripada TAY HUP LIAN, seorang namaan Defendan Pertama) untuk kepentingan Plaintif-Plaintif dan kegunaan untuk bayaran kos permohonan keluaran hak milik strata ...

[8] It is observed that although the money had been deposited with the appellant to be held by her as a stakeholder under the SPA, Histyle nevertheless agreed to the consent order and to withhold the retention money for the benefit of the plaintiffs. Neither the respondent nor the appellant was a party to the consent order.

[9] As a result of the appellant's refusal to release the retention sum, the developer threatened to sue the respondent for the said sum.

[10] Under the circumstances the respondent had no other option but to fork out another sum of RM500,000 to pay the developer, which she did, *via* bankers cheque dated 10 January 1996, as full settlement of the sums due to the developer. By a deed of reassignment dated 27 February 1996 the developer absolutely assigned its right to the retention sum to the respondent. On 22 April 1996 the respondent's solicitors demanded the appellant to pay the retention sum to their client. The request was not complied with.

[11] Thus, on 6 May 1996 the respondent sued the appellant for the recovery of the retention sum of RM500,000 together with interest thereon: *vide* Kuala Lumpur High Court Civil Suit No. 1-22-206-96.

[12] This suit was transferred to Johor Bahru High Court and renumbered as JB Civil Suit No. 22-200-1997 ("JB suit"). An amendment was made by substituting the appellant with Histyle and the Management Committee for Plaza Baru, Kluang as the first and second defendants respectively. As a result of the amendment the appellant ceased to be a party to the JB suit. In the JB suit the respondent sought an order that the stakeholder, ie, the appellant, release the retention sum of RM500,000 together with interest thereon to the respondent. The first defendant, Histyle, counterclaimed and sought among others, a declaration that:

(i) the SPA had been terminated;

A (ii) a return of RM665,280 which it had paid to the respondent;

(iii) the retention sum of RM500,000 and interest thereon be forfeited by Histyle.

[13] The case was then fixed for case management before Syed Ahmad
B Helmy JC on 24 February 2004, who struck out the respondent's suit due to non-attendance of her solicitor. The learned Judicial Commissioner also allowed judgment in default against the respondent in respect of Histyle's counterclaim. By the judgment in default Histyle obtained a declaration, among others, that the SPA was declared null and void and that the retention
C sum held by appellant, as a stakeholder, be forfeited by Histyle.

[14] On 4 March 2004 the respondent applied to set aside the judgment in default. It was dismissed by the learned Judicial Commissioner. The respondent appealed to the Court of Appeal. As at the date of the notice of appeal the retention sum was still with the appellant.

D **[15]** But on 10 January 2005 Messrs Nora SW Lam & Associates, solicitors for Histyle, served the default judgment on the appellant and demanded that the appellant released the retention sum to them.

[16] On 14 January 2005 the appellant released the retention sum to
E Histyle's solicitors notwithstanding the said appeal by the respondent. The appellant, by letter dated 17 January 2005 told the respondent's solicitors that she was not obliged to find out whether they would appeal against the judgment in default. Even if they appealed, she would still comply with the default judgment since there was no order for stay of execution.

F **[17]** On 10 December 2007 the Court of Appeal allowed the respondent's appeal, set aside the judgment in default in favour of Histyle and remitted the case to the Johor Bahru High Court for trial.

[18] Pending the disposal of the JB suit, the respondent filed an originating summons in Kuala Lumpur High Court *vide* OS 53-24-2248-2008 for an
G order to direct the appellant to pay the retention sum in court in an interest bearing account within three months of the said order.

[19] On 7 August 2009 Zabariah JC dismissed the respondent's originating summons with costs on the grounds that the appellant had already released the retention sum to Histyle pursuant to the default judgment given by Syed
H Ahmad Helmy JC on 5 January 2005. There was no order to stay the execution of the said default judgment. Her Ladyship also held that it was premature for the respondent to make the application as the claim for the retention sum was still pending before the Johor Bahru High Court. The learned judge was also of the opinion that the retention sum was no longer
I held by the appellant. Even if the respondent was entitled to the retention sum, the order should have been made against Histyle.

[20] The respondent, being dissatisfied, appealed against the said decision to the Court of Appeal.

[21] In the meantime, the trial of the JB suit had already commenced. On 29 April 2010, Vernon Ong J after a full trial made an order that the appellant, as the stakeholder, release the retention sum together with the interest thereon to the respondent's solicitors. In the event Histyle was in possession of the money, it has to pay the money to the stakeholder. There was no appeal against the said decision.

[22] On 11 October 2011 the Court of Appeal allowed the respondent's appeal against the decision of Zabariah JC and ordered the retention sum to be paid into court.

[23] On 18 July 2013 the appellant obtained leave of this court to appeal against the decision of the Court of Appeal which had set aside the decision of Zabariah JC on the following questions of law:

> (i) where a solicitor acts quo stakeholder for 2 parties (vendor and purchaser in a sale & purchase agreement involving real property) and is served with a valid, legal and subsisting order of the High Court declaring that the stake in question be forfeited by one of those two parties, then:
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> (a) does the solicitor act lawfully by paying the stake to the party declared to be entitled to the same; and
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> (b) in the event that the valid, legal and subsisting order is subsequently reversed upon appeal, is the solicitor concerned liable to make good the stake to the affected other party; and
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> (ii) although declaratory orders are *per se* unenforceable, can an order, although in the form of a declaration, nonetheless be enforceable and thus subject to compliance if phrased accordingly.

[24] The appellant did not deny being the stakeholder in respect of the retention money under the SPA. She justified her action in releasing the retention sum on the ground that she had acted lawfully and rightfully in compliance with the order of the court dated 5 January 2005 served on her by Histyle's solicitors. In the alternative, she sought refuge under s. 63 of the Trustee Act 1949 which states as follows:

> 63. If it appears to the Court that a trustee, whether appointed by the Court or otherwise, is or may be personally liable for any breach of trust, whether the transaction alleged to be a breach of trust occurred before or after the commencement of this Act, but has acted honestly and reasonably, and ought fairly to be excused for the breach of trust and for omitting to obtain the directions of the Court in the matter in which he committed such breach, then the Court may relieve him either wholly or partly from personal liability for the same.

[25] Section 63 speaks of liability of a trustee. By invoking s. 63 she put herself as a trustee for the retention sum.

[26] A stakeholder is a person who receives money and holds it *in medio* pending the outcome of a future event: *Kuldip Singh & Anor v. Lembaga Elektrik Negara & Anor* [1982] 1 LNS 73; [1983] 1 MLJ 258. How the money is to be released depends on the terms on which it is held; which in the case before us, is cl. 4 of the SPA. The word "Stake" is in common parlance used to apply to any money to be disposed of in accordance with what may happen in future and whoever is in possession of the money is often described as a stakeholder: *Toh Theam Hock v. Kemajuan Perwira Management Corp Sdn Bhd* [1987] 2 CLJ 26; [1987] CLJ (Rep) 400; (1988) MLJ 116.

[27] The liability of a solicitor in respect of money deposited with him as a stakeholder was considered by Lord Denning in *Burt v. Claude Cousins & Co Ltd* [1971] 2 QB 426, whose judgment, which we reproduce below, had been endorsed by the House of Lords in *Sorrell v. Finch* [1977] AC 728:

> If an estate agent or solicitor, being duly authorised in that behalf, receives a deposit "as stakeholder", he is under a duty to hold it *in medio* pending the outcome of a future event. He does not hold it as agent for the vendor, nor as agent for the purchaser. He holds it as trustee for both to await the event: see *Skinner v. Trustee of Property of Reed* (1967) 2 All ER 1286 at 1287], per Cross J Until the event is known, it is his duty to keep it in his own hands; or to put it on deposit at the bank; in which case he is entitled to keep for himself any interest that accrues to it: see *Harington v. Hoggart* (1830) 1 B & Ad 577]. If the purchaser should become entitled to the return of his deposit, he must sue the estate agent or solicitor for it: see *Elthem v. Kingsman* (1818) 1 B & Ad 683 and *Hampden v. Walsh* (1976) 1 QBD 189). He cannot sue the vendor, because the vendor has never received it, or become entitled to receive it.

[28] A concise and yet comprehensive statement of the law on the duty and responsibility of a stakeholder had been restated quite recently by this court in *Datuk M Kayveas & Anor v. Bar Council* [2013] 7 CLJ 533. Jeffrey Tan FCJ, in delivering the judgment of the court said:

> [31] In our system of conveyancing, "the word 'stake' is in common parlance used to apply to any money to be disposed of in accordance with what may happen in future: and whoever is in possession of the money is often described as a stakeholder. The manner in which the money is to be disposed of depends on the terms on which it is held" (*Toh Theam Hock v. Kemajuan Perwira Management Corp Sdn Bhd* [1987] 2 CLJ 26; [1987] CLJ (Rep) 400; [1988] 1 MLJ 116 per Hashim Yeop A Sani SCJ, as he then was, delivering the judgment of the former Supreme Court). "Solicitors who hold funds which are paid to them as stakeholders hold those funds as trustees for the client, whose property the funds remains at all times. Such funds are not held in a contractual or quasi-contractual capacity" (*Halsbury's Laws of England,* 4th edn, reissue vol. 44(1), para. 126). "… the obligations arising under a solicitor's undertaking go beyond contractual effect. They are obligations which a solicitor has a professional

duty, as well as a contractual duty, to observe" (*Bentley and Another v. Gaisford* [1997] 1 All ER 842, 848 per Sir Richard Scott VC). When solicitors hold funds as stakeholders, they hold those funds as trustees and not in a contractual or quasi-contractual capacity (see *Alimand Computer System Ltd v. Radcliffes & Co*, The Times 6 November 1991). "If an estate agent or solicitor, being duly authorised in that behalf, receives a deposit 'as stakeholder', he is under a duty to hold it *in medio* pending the outcome of a future event. He does not hold it as agent for the vendor, nor as agent for the purchaser. He holds it as trustee for both to await the evidence: see *Skinner v. Trustee of Property of Reed* [1967] 2 All ER 1286 at p. 1287, [1967] Ch 1194 at p. 1200) per Cross J. Until the event is known, it is his duty to keep it in his own hands; or to put it on deposit at the bank …" (*Burt v. Claude Cousins & Co Ltd* [1971] 2 QB 426 per Lord Denning MR in his dissenting judgment, which statement of the law was accepted by the House of Lords in *Sorrel v. Finch* [1977] AC 728, and referred in *Kuldip Singh & Anor v. Lembaga Letrik Negara & Anor (supra)*, *Dato' Seri Au Ba Chi & Anor v. Malayan United Finance Bhd & Anor (supra)* and *OCBC Bank (Malaysia) Bhd & Ors v. Lee Lee Fah & Ors & Another Appeal (supra)*, amongst others). "Once a solicitor holds money in trust for his client or any other party for a purpose, it does not matter whether the amount is sufficient to be utilised for that purpose. The money remains to be in trust" (*Selvaratnam Vellupillai v. Dr Jayabalan Karrupia*h [2009] 1 CLJ 872; [2009] 1 MLJ 794 per Zaki Azmi CJ, delivering the majority judgment of the court). Therefore, it is beyond argument that a stakeholder is a trustee and that the breach of a stakeholding term is not just a breach of undertaking but also a breach of trust.

[29] The Court of Appeal, in reversing the default judgment, found that the appellant had acted unreasonably in releasing the retention sum to Histyle. It held that there was no direction in the order of the Johor Bahru High Court ordering the appellant to forthwith pay out the retention sum to Histyle. The said order was declaratory in nature.

[30] A declaratory judgment is a formal statement by a court pronouncing upon the existence or non-existence of a legal state of affairs. It pronounces upon a legal relationship but does not contain any order which can be enforced against the defendant. This is different from an executory judgment where the courts determine the rights of the parties and then order the defendant to act in a certain way, for example by an order to pay damages. If it is disregarded, it can be enforced by official action, usually be levying execution against the defendant's property or imprisoning him for contempt of court: Lord Woolf and Jeremy Woolf, *The Declaratory Judgment*, 4th edn, Sweet & Maxwell.

[31] When the respondent's solicitors requested the appellant to release the retention money to the developer in 1995 on the strength that all the conditions under cl. 4 of the SPA had been complied with, the appellant resisted on the misguided belief that she was bound by the consent order. When another demand was made in 1996 to release the retention money to

A the respondent after the developer had assigned its right to the money to the respondent, the appellant ignored the request and chose to release the money to Histyle based on the default judgment, which was later reversed by the Court of Appeal. The appellant had, in doing so, taken the risk in releasing the money to Histyle as the appeal against the default judgment was still
B pending in the Court of Appeal.

[32] The outcome of the trial in the JB suit was not in favour of Histyle. After a full trial, Vernon Ong J held that all the conditions under cl. 4 of the SPA for the release of the retention sum had been complied with. The respondent did not commit any breach of the SPA. Histyle had, contrary to
C its contention, in fact taken possession of the 12 units of shop lot. It did not terminate the SPA. The respondent was not a party to the consent order. The consent order did not bind the appellant and the respondent. The caveats had been removed and the property had been transferred to Histyle.

D **[33]** There was no appeal against the decision by the learned judge. Although the appellant was not a party to the JB suit by reason of the amendment, the contentious issues pertaining to the SPA had finally been settled.

[34] It is now appropriate to advert to the questions posed to us. Question
E i(a) is based on the assumption that the order of the High Court was a valid order and binding on the appellant and not subject to appeal. It is obvious that said order could not be enforced against the appellant as she was not a party to the JB suit. She ceased to be a party to the JB suit after the respondent amended the writ and substituted her with Histyle. The appellant had therefore misconstrued the order given by the learned judge and
F wrongfully released the retention sum to Histyle.

[35] The answer to question (i)(b) is obvious. The appellant, being the stakeholder, is liable in law to make good the stake to the affected party, which is the respondent before us. As a matter of fact the default judgment
G was reversed by the Court of Appeal on 10 December 2007 before the leave to appeal to this court was granted.

[36] In view of the above answers, we do not find it necessary to answer question (ii).

[37] In the upshot, the appellant is dismissed with costs.
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